

Establishing Paternity For Purposes Of A Child Protective Proceeding

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Early Identification of Legal and Putative Fathers

Several reasons make it very important to establish the identity, location, and parental rights of the father of a child subject to child protective proceedings. Early identification and involvement of a noncustodial legal father who is actively involved in a child's life may allow him to serve as a safe and permanent placement for a child.¹ On the other hand, an absent and uninvolved legal father should be located, made a respondent to the petition, and, if appropriate, have his parental rights terminated. Early identification and location of a putative father and determination of his parental rights prevents later delays in proceedings and disruption of permanency plans.²

The State Court Administrative Office (SCAO) has produced the *Absent Parent Protocol: Finding and Notifying Non-custodial Parents in Child Protective Cases*. This protocol provides guidance to Family Independence Agency (FIA) caseworkers, private agency caseworkers, and courts on locating and involving absent fathers in child protective proceedings. Courts should ensure that agencies make thorough and diligent efforts to identify and locate legal and putative fathers.

Such efforts must occur during all stages of a case. If a legal or putative father's identity or location is unknown, a Children's Protective Services (CPS) worker should conduct a diligent search, including interviewing the child's mother and other relatives, initiating a search through FIA's Office of Child Support Enforcement, and checking telephone and other directories. If the search fails to reveal the father's identity or location, the CPS worker should complete an affidavit outlining his or her efforts, which may be submitted

¹ See *In re Campbell*, 129 Mich App 780, 784-85 (1983), where the Court of Appeals affirmed the trial court's termination of the mother's parental rights and dismissal of that portion of the termination petition pertaining to the child's father, who might be able to provide proper care and custody for the child with continued treatment.

² See *Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases* (National Council of Juvenile and Family Court Judges, 1995), p 33; *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* (National Council of Juvenile and Family Court Judges, 2000), p 10.

to the court along with a motion for alternative service of process or notice on the legal or putative father.³

A petition must identify both legal parents or identify a father as a putative father.⁴ If appropriate, allegations of child neglect by a legal or putative father must be included in the petition. If termination of parental rights is requested, only the child's legal father may be identified in the petition.⁵ However, if no legal father exists and a putative father who has a "substantial relationship" with his child exists but has failed to establish paternity, a court may provide notice to him and terminate his parental rights under the Juvenile Code.⁶ If no legal or putative father has been established, a court may include in its order a provision that terminates the rights of the child's mother and sole legal parent, and the rights of the child's biological father, including any rights "Richard Roe" may have.

At a preliminary hearing, "[i]f the father of the child has not been identified, the court must inquire of the mother regarding the identity and whereabouts of the father."⁷ A court should conduct a similar inquiry at subsequent hearings if a child's father has not been identified or located. FIA policy requires a foster care worker to:

- determine whether the mother was married at the time of conception or birth by talking with the mother and relatives;
- determine whether the parents are divorced and, if so, whether either parent is paying child support;
- check the child's birth certificate to see if a father is listed;
- contact the Friend of the Court to determine whether anyone has been paying child support;
- check with the Family Division of the Circuit Court to determine

³ MCR 3.920(B)(4)(b) and MCR 3.921(C)(1).

⁴ MCR 3.961(B)(2)(a). SCAO form JC 04 (petition) contains a check box to denote a father as a putative father.

⁵ MCR 3.977(B)(2) and *In re KH*, 469 Mich 621, 625, 630 n 14 (2004) (criticizing FIA for naming multiple men "and/or father John Doe" in a petition requesting termination of parental rights when a legal father existed).

⁶ *In re Bell*, 138 Mich App 184, 188-89 (1984).

⁷ MCR 3.965(B)(13).

whether an order of filiation has been entered; and

- contact the Probate Court to determine whether an affidavit of parentage has been filed.⁸

Distinguishing “Legal,” “Equitable,” and “Putative” Fathers

At the outset, fathers who have rights recognized by the law must be distinguished from those who don’t have such rights. A “legal father” is a man recognized by law as a child’s male parent. MCR 3.903(A)(7) defines “legal fatherhood” for purposes of child protective proceedings:

“(7) ‘Father’ means:

- (a) A man married to the mother at any time from a minor’s conception to the minor’s birth, unless a court has determined, after notice and a hearing, that the minor was conceived or born during the marriage, but is not the issue of the marriage;
- (b) A man who legally adopts the minor;
- (c) A man who by order of filiation or by judgment of paternity is judicially determined to be the father of the minor;
- (d) A man judicially determined to have parental rights; or
- (e) A man whose paternity is established by the completion and filing of an acknowledgment of parentage in accordance with the provisions of the Acknowledgment of Parentage Act, MCL 722.1001 et seq., or a previously applicable procedure. For an acknowledgment under the Acknowledgment of Parentage Act, the man and mother must each sign the acknowledgment of parentage before a notary public appointed in this state. The acknowledgment shall be filed at either the time of birth or another time during the child’s lifetime with the state registrar.

⁸ FIA *Services Manual*, CFF 722-6, p 15. The *Services Manual* also suggests that a father’s location may be determined through a “statewide CIS inquiry, Secretary of State inquiry, search of telephone books, US Post Office address search, Friend of the Court inquiry, check with County Clerk’s Office for vital statistics, contact last place of employment, follow up on leads provided by friends and relatives, legal publication, etc.” *Id.* The *Services Manual* also notes that foster care staff may use the Federal Parent Locator Service if the absent parent’s social security number is known, the FIA’s “Free Parent Locator Services” at <http://www.mfia.state.mi.us/chldsupp/locate/parentls.htm>, and the Michigan Department of Corrections “Offender Tracking Information System” at <http://www.state.mi.us/mdoc>.

This definition includes “[a] man judicially determined to have parental rights.” Upon divorce, a judge may determine that a man is an “equitable father.” An equitable father is a husband who is not the biological father of a child conceived or born during the marriage but who may be considered the child’s legal father if he meets certain criteria. In *Atkinson v Atkinson*,⁹ the Court of Appeals held that a man is an equitable father if:

- he is married to the child’s mother but is not the biological parent of a child born or conceived during the marriage;
- he and the child mutually acknowledge a relationship as father and child, or that the child’s mother has cooperated in the development of a father-child relationship over a period of time prior to filing for divorce;
- he desires to have the rights afforded to a parent; and
- he is willing to take on the responsibility of paying child support.

In addition, a man who is not a child’s biological father but married to the child’s mother may be estopped from denying paternity. For example, where a man married a pregnant woman knowing that he is not the child’s biological father and held himself out as the child’s father for more than nine years, the Court of Appeals held that the man was properly estopped from denying paternity.¹⁰ Similarly, where a man dissuaded a child’s mother from placing the child for adoption and agreed to raise the child as his own, the man was estopped from denying paternity.¹¹ However, where a child’s mother falsely led her husband to believe that he was the child’s biological father, estoppel was improper.¹²

Once a court determines that a man is a child’s equitable father, he “becomes endowed with both the rights and responsibilities of a parent. There is no distinction at that point between the ‘equitable parent’ and any other parent”¹³ The “equitable parent doctrine” only applies to married persons, not unmarried persons.¹⁴

⁹ 160 Mich App 601, 608-09 (1987).

¹⁰ *Johnson v Johnson*, 93 Mich App 415, 419-20 (1979).

¹¹ *Nygard v Nygard*, 156 Mich App 94, 96 (1986).

¹² *Bergan v Bergan*, 226 Mich App 183, 187-88 (1997).

¹³ *York v Morofsky*, 225 Mich App 333, 337 (1997).

¹⁴ *Van v Zahorik*, 460 Mich 320, 331-34 (1999).

A “putative father” is “a man who is alleged to be the biological father of a child who has no father as defined in MCR 3.903(A)(7).”¹⁵ A man may be considered a putative father only if a child has no legal father.¹⁶

Establishing Legal Fatherhood

If a child’s mother is married at any time from the child’s conception to his or her birth, the mother’s husband is presumed to be the child’s legal father. This “presumption of legitimacy” is reflected in several Michigan statutes and is firmly established under common law.¹⁷ In a plurality opinion, the United States Supreme Court concluded that an “adulterous biological father” has no constitutionally protected right to establish and maintain a relationship with his biological child.¹⁸ The Michigan Supreme Court has held that when a child is conceived or born during a marriage, a “strong, though rebuttable, presumption of legitimacy” arises, and that the husband or wife may testify regarding “nonaccess” to one another.¹⁹ This presumption must be rebutted by clear and convincing evidence.²⁰

If both legal parents assert the presumption of legitimacy, it is unassailable by third parties.²¹ If both legal parents assail the presumption, it may be rebutted through their

¹⁵ MCR 3.903(A)(23). *Black’s Law Dictionary* defines “putative father” as “[t]he alleged biological father of a child born out of wedlock.”

¹⁶ MCR 3.921(C).

¹⁷ See MCL 552.29, MCL 700.2114(1)(a), MCL 333.2824(1), and *People v Case*, 171 Mich 282, 284 (1912).

¹⁸ *Michael H v Gerald D*, 491 US 110 (1989) (opinion by Scalia, J). The Court found that the biological father’s due process rights were not violated by denying him standing to establish his parentage. The Court distinguished several cases, cited below, that assigned unwed fathers liberty interests in their established relationships with their children:

“Michael reads the landmark case of *Stanley v Illinois*, 405 U.S. 645 (1972), and the subsequent cases of *Quilloin v Walcott*, 434 U.S. 246 (1978), *Caban v Mohammed*, 441 U.S. 380 (1979), and *Lehr v Robertson*, 463 U.S. 248 (1983), as establishing that a liberty interest is created by biological fatherhood plus an established parental relationship -- factors that exist in the present case as well. We think that distorts the rationale of those cases. As we view them, they rest not upon such isolated factors but upon the historic respect -- indeed, sanctity would not be too strong a term -- traditionally accorded to the relationships that develop within the unitary family.” 491 US at 123.

¹⁹ *Serafin v Serafin*, 401 Mich 629, 634–36 (1977).

²⁰ *Id.* at 636.

²¹ See *In re CAW*, 469 Mich 192 (2003).

testimony alone.²² A legal father may contest paternity “by his best evidence”—blood or DNA test results.²³ Test results that preclude the possibility that a man is a child’s biological father are “conclusive and sufficient to rebut the presumption of legitimacy.”²⁴ Similarly, a child’s mother may contest the legal father’s paternity by requesting that a court order the legal father to submit to testing.²⁵ A mother’s testimony that she is uncertain whether the legal father is the biological father has been held insufficient to rebut the presumption of legitimacy.²⁶

If the presumption is rebutted, or if a child’s mother is unmarried from the child’s conception to his or her birth, paternity may be established under the Acknowledgment of Parentage Act, MCL 722.1001 et seq., or the Paternity Act, MCL 722.711 et seq.

A birth certificate is required for each child born in Michigan.²⁷ If a child’s mother is married at the time of conception or birth, the husband must be identified on the birth certificate as the child’s father.²⁸ However, an unmarried mother need not identify a child’s biological father on the child’s birth certificate.²⁹ If the child’s mother is not married at the time of conception or birth, the father’s name may not be placed on the birth certificate without the written consent of the child’s mother and the completion and filing of an acknowledgment of parentage by the mother and father.³⁰ A hospital must provide an unmarried mother or a putative father an acknowledgment of parentage form, and proper execution of the form by the child’s mother and father establishes the child’s legal paternity.³¹ If a child’s paternity is determined through an action under the Paternity

²² *In re KH*, 469 Mich 621, 636 (2004).

²³ *Serafin v Serafin*, 401 Mich 629, 640 (1977) (Coleman, J, concurring), and *Shepherd v Shepherd*, 81 Mich App 465, 470-71 (1978).

²⁴ *Shepherd*, *supra* at 471.

²⁵ *Atkinson v Atkinson*, 160 Mich App 601, 606-07 (1987).

²⁶ *Johnson v Johnson*, 93 Mich App 415, 418-19 (1979).

²⁷ MCL 333.2821(1).

²⁸ MCL 333.2824(1).

²⁹ See MCL 333.2824(5) (“If the child’s father is not named on the birth registration, no other information about the father shall be entered on the registration.”) and MCL 333.2824(7) (“After May 30, 1979, a birth certificate shall not contain a reference to the legitimacy or illegitimacy of a child.”)

³⁰ MCL 333.2824(2). A child’s parent must attest to the accuracy of information provided to complete a birth certificate. MCL 333.2867(2). The acknowledgment of parentage must be completed as required by the Acknowledgment of Parentage Act.

³¹ MCL 333.21532(1) and MCL 333.21533. The form is entitled “Affidavit of Parentage” (DCH-0682w).

Act, the father's name must be entered on the birth certificate as found and ordered by the court.³²

Both the Acknowledgment of Parentage Act and the Paternity Act require that a child be “born out of wedlock” before a person has standing to institute an action under those acts. The Paternity Act defines a “child born out of wedlock” as “a child begotten and born to a woman who was not married from the conception to the date of birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage.”³³ The Acknowledgment of Parentage Act does not define “born out of wedlock.” However, the definition of “child” is similar to the definition provided in the Paternity Act of a child “born out of wedlock.” The Acknowledgment of Parentage Act defines a “child” as “a child conceived and born to a woman who was not married at the time of conception or the date of birth of the child, or a child that the circuit court determines was born or conceived during a marriage but is not the issue of that marriage.”³⁴

Under the first clause of each act's definition, a child's mother must be unmarried during the entire gestation period.³⁵ Thus, if an unmarried woman conceives a child with a man and, before the child's birth, marries another man, the other man is the child's presumed legal father.

With regard to the second clause in each definition, case law interpreting the Paternity and Acknowledgment of Parentage acts has required that a court determination that a child was “not the issue of a marriage” occur prior to an action to determine custody, support, and parenting time. In *Girard v Wagenmaker*,³⁶ the Michigan Supreme Court held that for a putative father to have standing under the Paternity Act, a circuit court must have made a determination that the child was “not the issue of a marriage” at the

³² MCL 333.2824(4). The state registrar may issue a new birth certificate when the father's paternity has been established or upon receipt of an acknowledgment of parentage. MCL 333.2831(b) and MCL 333.2872(1).

³³ MCL 722.711(a).

³⁴ MCL 722.1002(a).

³⁵ *Spielmaker v Lee*, 205 Mich App 51, 58 (1994).

³⁶ 437 Mich 231, 242–43 (1991).

time the paternity complaint is filed. In *Aichele v Hodge*,³⁷ the Court of Appeals held that under the Acknowledgement of Parentage Act, a court determination that a child is “not the issue of a marriage” must occur before the mother and biological father may file a valid affidavit of parentage. In cases where the presumption of legitimacy applies, requiring a prior court determination that a child was not the issue of a marriage before a putative father has standing to assert paternity practically limits the persons who may testify regarding paternity to the child’s mother and presumed legal father.

If an unwed father’s paternity has been established or is uncontested and he has a “substantial” relationship with his child, he has a right to notice and a hearing on his fitness as a parent. In *Lehr v Robertson* and *Caban v Mohammed*,³⁸ the United States Supreme Court concluded that an unmarried biological father who has established a “substantial” relationship with his child has a protected liberty interest. A “substantial parent-child relationship” exists “when an unwed father demonstrates a full commitment to the responsibilities of parenthood by ‘coming forward to participate in the rearing of his child.’”³⁹ In *Stanley v Illinois*,⁴⁰ an unmarried father of three children challenged an Illinois law that presumed that unwed fathers were unfit parents. Under the law in question, upon their mother’s death, such children were declared state wards. The United States Supreme Court held “that, as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.”⁴¹

³⁷ 259 Mich App 146, 154-56 (2003), lv app denied 469 Mich 988 (2004).

³⁸ *Lehr v Robertson*, 463 US 248, 261–62 (1983), and *Caban v Mohammed*, 441 US 380, 392 (1979).

³⁹ *Michael H v Gerald D*, 491 US 110, 142–43 (1989) (Brennan, J, dissenting). See also MCL 710.39(1)–(2), which provide that under the Adoption Code, a putative father who has “established a custodial relationship” with the child or “provided substantial and regular support or care” to the mother or child may only have his rights terminated pursuant to a step-parent adoption or the Juvenile Code, and *In re Baby Boy Barlow*, 404 Mich 216, 229 (1978).

⁴⁰ 405 US 645 (1972).

⁴¹ *Id.*, 405 US at 649.

The “Putative Father Hearing” in Child Protective Proceedings

A “putative father hearing” in child protective proceedings may preserve a putative father’s rights. When a petition is filed alleging abuse or neglect of a child who has no legal father, the court may conduct a “putative father hearing” to begin the process of establishing the father’s paternity. MCR 3.921(C) contains the procedures for notifying a “putative father” and determining whether the “putative father” may be entitled to any rights regarding the child. “If, at any time during the pendency of a proceeding, the court determines that the minor has no father as defined in MCR 3.903(A)(7), the court may, in its discretion, take appropriate action as described in [MCR 3.921(C)].” The court is authorized to take testimony to attempt to establish the identity and address of a child’s biological father. Upon finding probable cause to believe that an identifiable person is the child’s biological father, the court must direct that notice be served on this putative father in any manner reasonably calculated to provide notice, including publication if his whereabouts remain unknown after diligent inquiry.⁴² Notice by publication must be provided if the putative father’s identity is unknown.⁴³ The court rule also requires that a notice to the putative father contain the following information:

- “(a) if known, the name of the child, the name of the child’s mother, and the date and place of birth of the child;
- “(b) that a petition has been filed with the court;
- “(c) the time and place of hearing at which the natural father is to appear to express his interest, if any, in the minor; and
- “(d) a statement that failure to attend the hearing will constitute a denial of interest in the minor, a waiver of notice for all subsequent hearings, a waiver of a right to appointment of an attorney, and could result in termination of any parental rights.”⁴⁴

After directing notice to an identifiable or unidentified putative father, the court may make one of several findings. First, the court may determine that a putative father has been served in a manner reasonably calculated to provide notice.⁴⁵ The court may

⁴² MCR 3.921(C)(1).

⁴³ *Id.*

⁴⁴ MCR 3.921(C)(1)(a)-(d).

⁴⁵ MCR 3.921(C)(2)(a).

determine by a preponderance of the evidence that the putative father is the child's biological father and allow him 14 days (or more for good cause shown) to establish legal fatherhood according to MCR 3.903(A)(7).⁴⁶ Alternatively, the court may find probable cause to believe that another identifiable man is the child's biological father and direct that notice be provided to that person as stated above.⁴⁷ If an identified putative father fails to appear after proper notice or appears but fails to timely establish paternity, "the court may find that the [biological] father waives all rights to further notice, including the right to notice of termination of parental rights, and the right to an attorney"⁴⁸ Finally, the court may determine that a diligent inquiry has been conducted and the identity of the child's biological father cannot be determined. If the court makes this finding, it may "proceed without further notice and without appointing an attorney for the unidentified person."⁴⁹

Until a child's putative father has legally established his relationship to the child, a putative father is not entitled to notice or participation in child protective proceedings.⁵⁰ In contrast to an unwed father who has established a substantial relationship with his children, a putative father has no protected liberty interest in his relationship with his children. In *In re CAW (On Remand)*,⁵¹ the Court of Appeals held that denying a putative father standing to intervene in a child protective proceeding does not violate due process guarantees. The Court of Appeals relied on previous cases dealing with due process rights under the Michigan Constitution. In *Hauser v Reilly*,⁵² the Court of Appeals found in Michigan's constitution a protected liberty interest. The Court in *Hauser*⁵³ stated:

"We agree with the reasoning of Justice Brennan in *Michael H[v Gerald D.]*, 491 US 110 (1989)]. Following that analysis, if plaintiff in this case had an established relationship with his child, we would hold that he had a protected liberty interest

⁴⁶ MCR 3.921(C)(2)(b).

⁴⁷ MCR 3.921(C)(2)(c).

⁴⁸ MCR 3.921(C)(3).

⁴⁹ MCR 3.921(C)(2)(d).

⁵⁰ *In re NEGP*, 245 Mich App 126, 134 (2001) and *In re Gillespie*, 197 Mich App 440, 442-46 (1992). See also MCR 3.921(B)(1)-(3).

⁵¹ 259 Mich App 181 (2003).

⁵² 212 Mich App 184 (1995).

⁵³ *Id.* at 188.

in that relationship that entitled him to due process of law. However, because plaintiff has no such relationship, we hold that the Paternity Act did not deny him his right to due process.”

However, in *McHone v Sosnowski*,⁵⁴ the Court of Appeals concluded that its statement in *Hauser* was dicta and refused to follow it. In *CAW (On Remand)*, the Court of Appeals concluded that even if it followed *Hauser*, the putative father in *CAW* had no protected liberty interest because he failed to establish a substantial relationship with the child.⁵⁵

Applying the Presumption of Legitimacy to Child Protective Proceedings

For purposes of child protective proceedings, a “legal father” may be “[a] man married to the mother at any time from a minor’s conception to the minor’s birth, unless a court has determined, after notice and a hearing, that the minor was conceived or born during the marriage, but is not the issue of the marriage.” As in the context of an acknowledgment of parentage or paternity action, if a child’s mother is married to a man at any time from the conception to the birth of that child, that man is presumed to be the child’s legal father, unless a court has made a prior finding that the child was not the issue of the marriage. Two recent Michigan Supreme Court cases have applied the presumption of legitimacy in the context of child protective proceedings.

In *In re KH*,⁵⁶ the Supreme Court held that where a presumed legal father exists, a putative father may not be identified or participate in child protective proceedings. However, if the mother and legal father rebut the presumption of legitimacy during the child protective proceeding, a trial court may make a finding that a child is not the issue of a marriage. The trial court may not, however, determine a child’s paternity within the child protective proceeding. The court’s finding that the child is not an issue of the marriage qualifies as a prior court finding for purposes of the Paternity Act.⁵⁷ A putative

⁵⁴ 239 Mich App 674, 679–80 (2000).

⁵⁵ *CAW (On Remand)*, *supra* at 185.

⁵⁶ 469 Mich 621 (2004).

⁵⁷ Although the Court identifies the Paternity Act as the “legislatively provided mechanism designed to govern the establishment of paternity claims,” *Id.* at 631, there does not appear to be an impediment to proceeding under the Acknowledgment of Parentage Act if the mother is willing to join in the acknowledgment. The Acknowledgment of Parentage Act is intended to avoid the necessity of adjudication under the Paternity Act where paternity is uncontested. MCL 722.1004.

father then may be notified and allowed an opportunity to establish his paternity. If the putative father properly establishes his paternity, he then has standing to participate in the child protective proceeding.

In *KH*, the FIA filed a petition to terminate the parental rights of the mother and legal father of four children. The children's legal parents testified that they were married during each child's conception and birth. Based on DNA test results admitted at trial, a referee determined that another man, Larry Lagrone, was the biological father of three of the children. Relying on *In re Montgomery*,⁵⁸ a circuit court judge ruled that Lagrone was the biological father of the three children and had standing to establish his paternity. However, the judge did not make an express finding that the children were not the issue of the marriage.

The Supreme Court reasoned that MCR 5.921(D)⁵⁹ permitted a putative father to be identified and given notice of court hearings only if a child had no legal father. If a child has a legal father as defined in MCR 5.903(A)(4),⁶⁰ a putative father could not be identified or given notice. Because their mother was married from their conception to their birth, the three children in question had a legal father and no other man could be identified as a putative father unless the minors were determined to be "born out of wedlock." MCR 5.903(A)(1)⁶¹ defined a "child born out of wedlock" as a child "conceived and born to a woman who is unmarried from the conception to the birth of the child, or a child determined by judicial notice or otherwise to have been conceived or born during a marriage but who is not the issue of that marriage." Lagrone argued that the trial court's finding that he was the biological father of the three children constituted a finding that the children were "born out of wedlock." The Supreme Court disagreed and applied the requirement of *Girard v Wagenmaker* to child protective proceedings:

⁵⁸ 185 Mich App 341 (1990).

⁵⁹ Now MCR 3.921(C). Although *KH* was decided under the court rules in effect prior to May 1, 2003, the Court notes that the analysis and outcome of the case would be the same under the current court rules. *KH*, *supra* at 624 n 1.

⁶⁰ Now MCR 3.903(A)(7).

⁶¹ The definition of "child born out of wedlock" was incorporated into the definition of "father" in MCR 3.903(A)(7)(a).

“[W]e conclude, consistently with the language of the Paternity Act, that a determination that a child is born out of wedlock must be made by the court before a biological father may be identified in a child protective proceeding.

“Under either version of the court rule, MCR 5.921(D) or MCR 3.921(C), a prior out-of-wedlock determination does not confer *any type* of standing on a putative father. Rather, the rules give the trial court the discretion to provide notice to a putative father, and permit him to establish that he is the biological father by a preponderance of the evidence. Once proved, the biological father is provided fourteen days to establish a legally recognized paternal relationship.

“Nothing in the prior or amended court rules permits a paternity determination to be made in the midst of a child protective proceeding. Rather, once a putative father is identified in accordance with the court rules, the impetus is clearly placed on the putative father to secure his legal relationship with the child as provided by law. If the legal relationship is not established, a biological father may not be named as a respondent on a termination petition, the genetic relationship notwithstanding.”⁶²

In *KH*, the record contained evidence that the presumption of legitimacy had been rebutted. During the course of the proceedings, both the mother and legal father testified that the legal father was not the children’s biological father. The legal father also testified that he did not wish to participate in the proceedings, which, the Court concluded, could reasonably be construed as an indication that the legal father was prepared to renounce the benefit afforded to him by the presumption of legitimacy and to not claim the children as his own. The Court stated:

“If Mr. Lagrone had been . . . identified[as a putative father], and elected to establish paternity as permitted by MCR 5.921(D)(2)(b),⁶³ the out-of-wedlock determination made in the child protective proceeding could serve as the prior

⁶² *KH*, *supra* at 633-34.

⁶³ Now MCR 3.921(C)(2)(b).

determination needed to pursue a claim under the Paternity Act. *Girard [v Wagenmaker*, 437 Mich 231 (1991)].

“Accordingly, this case is remanded to the trial court for such a determination. If the court finds that the presumption of legitimacy was rebutted by clear and convincing evidence from either parent that the children are not the issue of the marriage, the court may take further action in accordance with MCR 5.921(D).”⁶⁴

The Michigan Supreme Court overruled *Montgomery*, in which a child’s legal father was dismissed from proceedings after he admitted that he was not the child’s biological father. The trial court then declared another man to be the child’s biological father. The child’s legal father appealed, and the Court of Appeals held that the legal father’s admission that he was not the child’s biological father meant that he was not the child’s legal father as defined in the applicable court rules. Thus, he did not have standing to participate in the child protective proceeding.⁶⁵ In overruling *Montgomery*, the Supreme Court in *KH* clearly distinguished between the legal father’s admission that he was not the child’s biological father and his authority to claim the benefit of the presumption of legitimacy:

“That the legal father admitted having no *biological* relationship to his child does not indicate that he was interested in relinquishing his parental rights to his child. Because the legal father appealed his dismissal from the proceedings, it is fair to infer that he wanted to be part of the termination proceedings, and may have been interested in planning for the child. Nothing in *Montgomery* indicates that the legal father was given the opportunity to claim the benefit of the presumption of legitimacy.”⁶⁶

Prior to *KH*, in *In re CAW*,⁶⁷ the Michigan Supreme Court held that a putative father did not have standing to intervene in a child protective proceeding following termination of

⁶⁴ *KH*, *supra* at 637.

⁶⁵ *Montgomery*, *supra* at 343.

⁶⁶ *KH*, *supra* at 635-36 n 29.

⁶⁷ 469 Mich 192, 199 (2003).

the legal father's parental rights. In *CAW*, the child's mother and legal father were married from the child's conception to birth, and the trial court did not make a finding during the proceedings that the child was not the issue of the marriage. Termination of the mother's and legal father's parental rights was not a determination that the child was not the issue of the marriage. Therefore, the putative father did not have standing to intervene in the proceedings.